JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico inasmuch as it rests on the adequate non-federal basis that the 1961 Amendment to the New Mexico Public Utility Act denied Respondent equal protection of the laws under the State Constitution.[1]

QUESTION PRESENTED

Whether the Supreme Court of New Mexico correctly held that the 1961 Amendment to the New Mexico Public Utility Act violated the equal protection clauses of the New Mexico and United States Constitutions by classifying rural electric cooperatives as public utilities under the Act, thereby giving them all of the benefits of that status without imposing on them the burdens which the Act imposes on Respondent and other members of the class.

STATEMENT

The controversy giving rise to this case originated when Petitioner Otero County Electric Cooperative, Inc., filed with the New Mexico Public Service Commission an objection to the proposed extension by Respondent of its existing facilities into contiguous territory for the purpose of rendering electric service to the Sun Valley Subdivision (R-244). The proposed

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[1] In concluding its decision, the Supreme Court of New Mexico stated:

> "We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18, of the New Mexico Constitution." Appendix A of Petition, p. 42.

extension was being made in response to the request of the owner of the subdivision and pursuant to a contract between the owner and Respondent for rendition of the service (R-243).

The New Mexico Public Service Commission hereafter will be referred to as "the Commission", Petitioner Otero County Electric Cooperative, Inc., as "Otero", and Respondent Community Public Service Company as "Community".

After a hearing on the objection of Otero, the Commission granted a certificate of convenience and necessity embracing the subdivision to Otero and enjoined rendition of the service by Community (R-19, 25). In its pleading before the Commission (R-229, 232) Community asserted that Chapter 89 of Laws of New Mexico 1961 which purported to make electric cooperatives public utilities under the New Mexico Public Utilities Act, violated the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico, and that by reason thereof Otero had no standing as a public utility to object to the extension of its lines by Community.

This question was also raised by Community's pleading (R-8, 11) in the statutory review proceeding in which the District Court of Lincoln County, New Mexico, affirmed the decision of the Commission. The opinion below of the Supreme Court of New Mexico was on appeal from judgment of the District Court of Lincoln County.

The presence of the New Mexico Public Service Commission, and its Commissioners as parties to the review proceeding in the District Court and the appeal

to the Supreme Court of New Mexico, and as Petitioners in this proceeding, results from § 68-9-1, N.M.S.A., 1953 Comp. (Appendix C of Petition, p. 79), which requires that the Commission be named as a party respondent in every petition for review of an order of the Commission by a District Court.

The constitutional issue decided by the Supreme Court of New Mexico is the product of a unique judicial and legislative history having its genesis in the enactment of the New Mexico Rural Electric Cooperative Act (Appendix D of Petition, p. 86) in the year 1939, and in the enactment of the New Mexico Public Utility Act (Appendix C of Petition, p. 52) in 1941. In the Public Utility Act of 1941, rural electric cooperatives organized under the Rural Electric Cooperative Act were expressly exempted from the jurisdiction of the Public Service Commission.[2] The Act further defined a "public utility" as:

> "every person not engaged solely in interstate business and except as hereinafter stated, that now does or hereafter may own, operate, lease or control:
>
> "(1) Any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity . . . ."[3]

In the year 1959, in the case of *Socorro Electric Co-op, Inc.* v. *Public Serv. Co.*, 66 N.M. 343, 348 P. 2d 88 (1959), the Supreme Court of New Mexico was confronted with the question of whether a cooperative was a "public utility", and thereby entitled to protest

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[2] Laws N.M. 1941, ch. 84, § 2; Appendix C of Petition, pp. 54, 55.

[3] Laws N.M. 1941, ch. 84, § 1; Appendix C of Petition, p. 53.

the extension of the lines and service of a regulated public utility. The court construed the above quoted definition of "public utility", and held that a cooperative could *not* come within this definition since it did not, and could not, render service "to or for the public" as required by the Act. This inability resulted from the provision of the Rural Electric Cooperative Act limiting an electric cooperative to sale of electricity to its members and "to governmental agencies and political subdivisions, and to other persons not in excess of ten per centum (10%) of the number of its members."[4]

As the Court below recognized, the amendment of the Public Utility Act which followed in 1961, in effect, overruled the *Socorro* decision by legislative fiat, purporting to "make rural electric cooperatives into public utilities",[5] whether or not they met the public service requirement of the Act, which continued unchanged.

No contention is, or has ever been, made in this case that the legislature lacked the power to regulate rural electric cooperatives. As recognized in the opinion below,[6] the question presented was whether the manner in which the legislature sought to accomplish this purpose, by Chapter 89 of the Laws of 1961, transgressed the equal protection clause of either the Federal Constitution or the New Mexico Constitution.

While constitutional grounds other than discrimination in violation of the equal protection clauses of the Federal and State Constitutions were asserted below,

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[4] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

[5] Appendix A of Petition, p. 38.

[6] *Ibid.*

the New Mexico Court did not reach them inasmuch as it concluded that the 1961 Act was vulnerable to the equal protection attack.[7]

In essence the Court below held that the 1961 Amendment discriminated against Community in that it sought to place cooperatives in the same class with Community yet did not require them to render service "to or for the public" as was required of the other members of the class, and further did not require the rates of cooperatives to be regulated when the rates of other members of the class were regulated. This discrimination, the New Mexico Court concluded, contravened the Fourteenth Amendment to the Federal Constitution and Article II, Sec. 18 of the Constitution of New Mexico, resulting in the invalidity of Chapter 89 of the Laws of New Mexico of 1961.[8]

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[7] Community also contended that the 1961 Amendment to the New Mexico Public Utility Act deprived it of its property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the Constitution of the State of New Mexico (R-277). The Court below stated at the close of its decision:

> "Having concluded that the questioned legislation must be held invalid as violative of the Constitutions in the manner hereinabove discussed, it is not necessary for us to consider the additional grounds of unconstitutionality argued by Community in its brief." Appendix A of Petition, p. 43.

[8] Appendix A of Petition, p. 42.

ARGUMENT

I.

There Is No Jurisdiction To Review the State Judgment, Since the Judgment Rests on an Adequate Non-Federal Basis, in That the Court Below Held That the 1961 Amendment to the New Mexico Public Utility Act Denied Community Equal Protection of the Laws Under the State Constitution.

The decision below rests in part upon a federal question, yet in no event can the federal question be said to have been controlling in the disposition of the cause. The attack of Community on the validity of the 1961 Act was nowhere limited to its violation of the equal protection clause of the Fourteenth Amendment. In every instance Community asserted that the Act contravened the equal protection clauses of both the Fourteenth Amendment to the Federal Constitution and Article II, Sec. 18 of the Constitution of New Mexico (R-11, 50, 51, 95-97, 232, 233, 277, 278).

In its opinion the New Mexico Supreme Court made it quite clear that it was declaring the Act fatally defective on both the federal and state grounds.[9] Having concluded that under the 1961 Amendment, Otero "does not and cannot serve the public generally and does not have its rates controlled except in overlapping situations," and that this placed Otero at a decided advantage as compared to Community,[10] the Court said:

> "This is what is prohibited by the Fourteenth Amendment to the Constitution of the United States, and by Art. II, § 18, of the Constitution of New Mexico."[11]

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[9] *Ibid.*

[10] Appendix A of Petition, p. 40.

[11] *Ibid.*

Later in its opinion the Court again made clear that it reached its conclusion on state as well as federal grounds when it said:[12]

> "The language of this court in State v. Thompson, 57 N.M. 459, 463, 260 P. 2d 370, fully recognizes this rule under both the Constitutions of the United States and of New Mexico." Citing also *State* v. *Sunset Ditch Co.*, 48 N.M. 17, 145 P. 2d 219 (1944).

Any possible question as to whether the Supreme Court of New Mexico was relying on the provision of the New Mexico Constitution, in addition to the equal protection provision of the Federal Constitution, must be answered by the Court's own statement of the conclusion which it had reached:[13]

> "We have concluded that the amendments to our public utility law discussed here are discriminatory and deny to Community the equal protection of the laws and are violative of the Fourteenth Amendment of the United States Constitution, and of Art. II, § 18, of the New Mexico Constitution."

In the words of Mr. Justice White, expressing the view of seven members of this Court in *Jankovich* v. *Indiana Toll Rd. Comm'n*, 379 U.S. 487, 491-92, 13 L. Ed. 2d 439, 443, 85 S. Ct. 493, 495-96 (1965):

> "In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the

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[12] Appendix A of Petition, p. 42.

[13] *Ibid.*

state judgment. New York City v. Central Savings Bank, 306 US 661, 83 L ed 1058, 59 S Ct 790, explained in Minnesota v. National Tea Co., 309 US 551, 556-557, 84 L ed 920, 923, 60 S Ct 676; Lynch v. New York ex rel. Pierson, 293 US 52, 79 L ed 191, 55 S Ct 16 . . . Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold."

The present case provides an even clearer instance for the application of the rule referred to by Mr. Justice White because the opinion of the Indiana court contained no express statement by the court of its reliance upon the state constitutional ground, in addition to the Federal ground, as does the opinion of the New Mexico Court.

It is to be noted also that Petitioners concede that the New Mexico Supreme Court based its decision in part on the state ground. They state in their Petition that the Court, after determining that the 1961 Act violated the Federal Constitutional provision, continued its opinion and "determined the 1961 amendments violative of the State constitutional provision. . . ."[14]

Under the circumstances here present, an absence of jurisdiction to review the opinion of the New Mexico Supreme Court below becomes quite apparent.

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[14] Petition, p. 12, footnote 12.

II

The Issue in the Present Case Has No Importance Outside the State of New Mexico and Is Not One Warranting Review by This Court

The issue in the present case is of no importance elsewhere since it arises from New Mexico's unique judicial and legislative background. Its very existence resulted from the decision of the New Mexico Court in *Socorro*[15] that an electrical cooperative could not qualify as a public utility, so long as the New Mexico statute made the rendition of service "to or for the public" a prerequisite for utility status. By the 1961 Amendment, the New Mexico legislature in effect undertook to overrule the *Socorro* decision by legislative fiat. Instead of adopting a comprehensive scheme which would have been constitutionally acceptable, the legislature attempted to accomplish its purpose by expressly including cooperatives in the statutory definition of public utilities.[16] The Amendment, however, did not change the requirement that a "public utility" render service "to or for the public",[17] nor did it change the statutory provision[18] whereby cooperatives were prohibited from rendering service to the public. Thus the legislature attempted to overcome *Socorro* by changing the form but not the substance of the statute. Its error was compounded when the legislation exempted the cooperatives from the general rate

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[15] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

[16] Laws N.M. 1961, ch. 89, § 2; Appendix B of Petition, p. 46.

[17] *Ibid.*

[18] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

regulation[19] by the Public Service Commission which applied to all other members of the class in which it had placed cooperatives.[20]

The particular interplay between legislative and judicial action which produced the defective New Mexico Act has not occurred elsewhere.[21] Thus the resulting constitutional question, as to the validity of this ill advised legislative effort, review of which is now sought, is unique and is peculiar to New Mexico. Whatever its importance within the state, it has now been decided by the highest court of the state, and it has no importance elsewhere. Any local problems resulting from the decision are notable for the ease with which they can be disposed of by the next session of the legislature through legislation meeting constitutional standards.

The fact that the New Mexico situation is unique may well explain why the opinion below of the Supreme Court of New Mexico is the only reported case in the United States dealing with the issue here involved. It also demonstrates that a decision of this Court on the issue would affect no state other than New Mexico. Such a question can hardly be said to have immediate importance beyond the particular facts and parties in-

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[19] Laws N.M. 1961, ch. 89, § 5; Appendix B of Petition, p. 48

[20] § 68-5-4; N.M.S.A., 1953 Comp.; Appendix C of Petition, p. 59.

[21] At least twelve other jurisdictions have subjected rural electric cooperatives to regulation by a public service commission (Alaska, Arkansas, Colorado, Delaware, Indiana, Kansas, Kentucky, Maine, Maryland, Mississippi, New Hampshire and Virginia). In these jurisdictions either the legislation provides equality of regulation between cooperatives and other public utilities, or the legislation coupled with the judicial background does not create the inequality held constitutionally defective by the New Mexico Court below.

volved which would justify its consideration by this Court.

III.

The Decision Below Is Based Upon a Proper Application of Precedents of This Court and the Supreme Court of New Mexico, and Is Clearly Correct.

The denial of equal protection of the laws to Community which resulted from the 1961 Amendment to the Public Utility Act of New Mexico is readily apparent. But except for the 1961 Amendment, Otero had no standing to protest the extension of Community's lines to serve its customer. Community and Otero were placed in the same class of electric public utilities by the Amendment, each thereby being entitled to the full benefits bestowed by the Act, and yet there is an invidious difference in the burdens imposed on each by the Amendment.

In order for Community to gain the benefits of the Act as amended, it is required to render its services "to or for the public". This phrase had been construed by the New Mexico Court to entail the dedication or devotion of Community's entire plant, facilities, system and services to public use, to the extent that all members of the general public have a legal right to demand and receive its services.[22] On the contrary, however, Otero gains the benefits bestowed by the Act even though it does not and cannot render its services "to or for the public" since it is limited by statute to serving members of the cooperative and non-members,

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[22] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

not in excess of 10 percent of the number of its members.[23]

Also, by reason of its inclusion in the definition of a public utility under the Act, Community's rates are subject to full regulation by the Commission.[24] On the other hand, Otero gains the benefits bestowed by the Act while its rates are regulated only in the exceptional situation where it has a certificate to serve in territory in which an overlapping or conflicting certificate has been issued to another public utility.[25]

Thus, there is a demonstrable lack of uniformity of treatment between members of the same class. This was the invidious discrimination found by the Court below to contravene the equal protection clauses of the Federal Constitution and of the Constitution of New Mexico.

In their elaborate arguments that no discrimination results from the 1961 Amendment to the Act, Petitioners incorrectly portray the situation presented below. They contend that Otero was rendering service "to or for the public" in the rural areas where it operated (Petition, pp. 18, 19, 26). This contention is irreconcilable with the prior decision of the New Mexico Court construing the statutory provision under which Otero was organized.[26] That provision, as in-

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[23] § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86. See Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

[24] §§ 68-5-4, 68-6-1, N.M.S.A., 1953 Comp.; Appendix C of Petition, pp. 59, 68.

[25] Laws N.M. 1961, ch. 89, § 5; Appendix B of Petition, p. 48.

[26] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959), interpreting § 45-4-3(d), N.M.S.A., 1953 Comp.; Appendix D of Petition, p. 86.

terpreted by the New Mexico Court, prohibits Otero from rendering its services "to or for the public", since all members of the general public, even in any given rural area, do not have the legal right to demand its services.[27]

Petitioners also contend that the only unequal treatment in rate regulation occurs when the investor owned utility is not in competition with the cooperative, a "situation which is not even claimed to exist in the case at bar" (Petition p. 27). They seem to imply by this statement that Otero's rates were subject to regulation by the Commission in the case at bar. This implication, and the contention based upon it, ignore the specific finding of the Commission in its Order which was relied upon by the Court below, that:

> "Otero's rates are fixed by its Board of Trustees and are not subject to regulation by the Public Service Commission." (R-23); Appendix A of Petition, p. 39.

Petitioner's argument that the members of Otero have a voice in the management of the cooperative and that this affords a reasonable and rational basis for the lack of full and complete regulation of the rates charged by Otero, also misapprehends the true situation which exists below. Regardless of any protection which may be afforded the members of Otero in this regard, the customers who are non-members of the cooperative, which may total 10 percent of the number of the members, have no voice whatsoever in the management of the cooperative and have no assurance of adequate electric service at fair, reasonable and just

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[27] Socorro Electric Co-op, Inc. v. Public Serv. Co., 66 N.M. 343, 348 P. 2d 88 (1959).

rates.[28] The discrimination against Community as to rate regulation, therefore, cannot be rationalized on this basis.

It was in this context that the Court below stated that insofar as Community sought to serve the public and Otero sought to serve customers who were not members of the cooperative, both companies were attempting to secure business out of which they could make a profit.[29] The Court could find no valid basis for applying one set of rules to Community and a different set of rules to Otero, and obviously there is no basis for such invidious discrimination.[30] It was also in this context that the Court below cited and quoted from *Frost* v. *Corporation Comm'n,* 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929). Contrary to the contention of Petitioners, it is obvious that in this context and as to the conclusion it reached on the equal protection issue, the New Mexico Court's application of the *Frost* case was eminently proper.

A careful consideration of the actual basis of the decision of the Court below makes it abundantly clear that the precedents of this Court and of the Supreme Court of New Mexico were properly applied by the Court below, and that the 1961 Amendment to the Public Utility Act of New Mexico denied Community equal protection of the laws and was violative of the Fourteenth Amendment of the United States Constitution, and of Article II, Section 18 of the New Mexico Constitution. The decision below, therefore, is clearly correct.

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[28] §§ 45-4-8, 45-4-20, N.M.S.A., 1953 Comp.; Appendix D of Petition, pp. 89, 102.

[29] Appendix A of Petition, p. 40.

[30] *Ibid.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROSS L. MALONE
BENNETT L. SMITH
BOB F. TURNER
Counsel for Respondent